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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ANGEL FRALEY; PAUL WANG; SUSAN MAINZER; JAMES H. DUVAL, a minor, by and through JAMES DUVAL, as Guardian ad Litem; and W.T., a minor, by and through RUSSELL TAIT, as Guardian ad Litem; individually and on behalf of all others similarly situated, Plaintiffs, v. FACEBOOK, INC., a corporation; and DOES 1-100, Defendants.	**Case No. CV 11-01726 LHK PSG** **ADMINISTRATIVE MOTION AND NOTICE TO FILE DOCUMENTS AND PORTIONS OF DOCUMENTS UNDER SEAL** Courtroom: 8 Judge: Hon. Lucy H. Koh Trial Date: December 3, 2012

NOTICE

Notice is hereby given that Plaintiffs will move the Court to File Documents and Portions of Documents under Seal. This Motion will be delivered to Hon. Lucy H. Koh on March 29, 2012 and considered upon receipt or as soon thereafter as it may be considered. This Motion will be based on this Notice and Administrative Motion in Support and the Declaration of Kevin M. Osborne.

I. INTRODUCTION

Plaintiffs submit this Administrative Motion to File Documents and Portions of Documents under Seal accompanying Plaintiffs' Motion for Class Certification. The Motion for Class Certification relies on documentary and deposition evidence that has been designated confidential by either Defendant or Plaintiffs. This Motion is filed pursuant to and in conformity with Civil Local Rule 79-5 and General Order 62.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this class action against Facebook on behalf of a putative Class of individuals whose names, photographs, likenesses or identities were used in association with Facebook's Sponsored Stories advertisement. Early in the litigation, the parties entered into a Stipulated Protective Order for Litigation Involving Highly Confidential Information and/or Trade Secrets ("the Order") (Attached as Exhibit 1 to the Declaration of Kevin M. Osborne hereinafter "KMO Decl.," filed herewith). The Order was approved and signed by counsel for both parties on August 23, 2011 and Magistrate Judge Paul S. Grewal on September 15, 2011. *Id.* Under the Order's instructions, any party seeking to file protected material first requires "written permission from the Designating Party or a court order." *Id.* at 15, ¶ 13.3. The Order further states "a sealing order will only issue upon a request establishing that the Protected

Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law." *Id.*

Plaintiffs will submit their Motion for Class Certification on March 29, 2012. A number of documents and excerpts of deposition transcripts that will be included with Plaintiffs' motion have been designated as confidential by Facebook pursuant to the Order. Additionally, Plaintiffs will include excerpts from deposition testimony and interrogatory responses that Plaintiffs have designated confidential.[1] Accordingly, Plaintiffs hereby submit an Administrative Motion to file these items under seal.

III. ANALYSIS

A. Documents Designated Confidential by Facebook

A party submitting evidence that another party has deemed confidential must file and serve an Administrative Motion for a sealing order and lodge with the court clerk the designated evidence. Civil L.R. 79-5(d). Thereafter, the party that designated the evidence as confidential must file a declaration establishing that the designated evidence is sealable and propose a narrowly tailored order. *Id.*

In this instance, Facebook has responded to many of Plaintiffs' discovery requests with documents designated "Confidential" or "Highly Confidential." KMO Decl., ¶ 3. Facebook has further designated the deposition testimony of its witnesses as confidential. *Id.* at ¶ 4. Many of these documents and deposition testimony excerpts are germane to Plaintiffs' Motion for Class Certification and are included as exhibits with that Motion. Therefore,

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[1] All documents and deposition transcripts are identified with particularity in the accompanying Declaration of Kevin M. Osborne and lodged with the Court in concert with this Administrative Motion, pursuant to Civil Local Rule 79-5.

Plaintiffs intend to file the exhibits as entire documents under seal. Additionally, Plaintiffs' Motion for Class Certification and accompanying expert declarations include interpretations of and statements relating to these confidential documents. Plaintiffs will file portions of these documents under seal. Plaintiffs will have met all that is required of them under Rule 79-5(d) by filing and serving this Administrative Motion and the lodging the designated documents.

B. Documents Designated Confidential by Plaintiffs

When a party submits evidence that the party itself has designated confidential, the submitting party must justify sealing the document. Fed. R. Civ. P. 26(c); Civil L.R. 79-5(b) & (c). Documents and testimony obtained through pretrial discovery are presumed public information. *San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999). The submitting party overcomes the presumption, however, with a showing that prejudice or harm will result if no protection is granted. *Verizon Cal., Inc. v. Ronald A. Katz Tech. Licensing, L.P.*, 214 F.R.D. 583, 585 fn.9 (C.D. Cal 2003). Specifically, "good cause" allows the court to keep documents attached to non-dispositive motions, such as a motion for class certification, under seal. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179-1180 (9th Cir. 2006). The question is whether "'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002).

Plaintiffs in the present case request three documents be filed under seal; the deposition testimony of James Duval, the deposition testimony of minor W.T., and select interrogatory responses of W.T. The portions of the deposition of Duval that Plaintiffs seek to file under seal relate to private information, including his date of birth, home address, e-mail addresses, and specific named individuals with whom he has connected on Facebook.com. KMO Decl., ¶ 10. This information should not be released to the public at large for the simple reason that it is his private information. Portions of the deposition testimony relate to Duval's understanding of illicit drug use. *Id.* This information is particularly inflammatory as it relates to illegal activities and potentially exposes Duval to libelous accusations. Furthermore, at the time Duval gave his deposition, he was a minor. KMO Decl., ¶ 9. As discussed in more detail below, the rules governing discovery in this jurisdiction offer special protections to minors. Because the information contained in the transcript is highly private and because of Duval's infancy at the time of the deposition, the Court should allow Plaintiffs to file the transcript under seal.

The deposition testimony and interrogatory responses of named class representative minor W.T. should be filed under seal because of his infancy. KMO Decl., ¶ 11. As recognized in various portions of the Rules of Civil Procedure, minors are afforded heightened privacy protections in litigation. *See* Fed. R. Civ. P 5.2. Since W.T. is under the age of 18, his counsel should be allowed to protect his interests and file evidence obtained from him under seal.

IV. CONCLUSION

Plaintiffs have done that which is required of them in order to file the documents Defendant Facebook has designated as confidential under seal. As for those documents Plaintiffs have designated confidential, Plaintiffs have good cause and their privacy interests

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outweigh any potential publicity interests. Therefore, the Court should permit Plaintiffs to file these under seal.

By:______________________________

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By ______/s/ Jonathan M. Jaffe____________

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